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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. W. R. GRACE, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. MCCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, ROBERT C. WALSH, Defendants.	Cause No. CR-05-07-M-DWM **DEFENDANTS WALSH, ESCHENBACH, AND McCAIG'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE KNOWING ENDANGERMENT OBJECT OF COUNT I**

Defendants Robert C. Walsh, Henry A. Eschenbach, and William J. McCaig (the "Non-CAA Defendants") hereby respectfully submit this

Motion for Judgment of Acquittal on the Knowing Endangerment Object of Count I ("Motion").

I. INTRODUCTION

The *ex post facto* clause of the United States Constitution, U.S. Const. art. 1, § 9, cl. 3, bars a jury from convicting a defendant of conspiring to violate a statute solely on the basis of conduct that predates that statute's enactment. The knowing endangerment provision of the Clean Air Act, 42 U.S.C. § 7413(c)(5)(A), did not become law until November 15, 1990. Because the Government has conceded in its opening statement that the Non-CAA Defendants did not agree to violate 42 U.S.C. § 7413(c)(5)(A) on, or subsequent to, November 15, 1990, this Court should enter an order acquitting the Non-CAA Defendants of conspiracy to violate the Clean Air Act.

II. THE *EX POST FACTO* CLAUSE BARS FURTHER PROSECUTION OF THE NON-CAA DEFENDANTS FOR CONSPIRACY TO VIOLATE 42 U.S.C. § 7413(c)(5)(A), ABSENT ANY AGREEMENT BY THOSE DEFENDANTS ON OR AFTER NOVEMBER 15, 1990 TO ACHIEVE THAT OBJECT

A. The *ex post facto* clause bars conviction of a defendant for conspiracy to violate a statute solely on the basis of conduct occurring prior to the enactment of that statute.

The *ex post facto* clause of the United States Constitution, U.S. Const. art. 1, § 9, cl. 3, is violated "when: (1) a law is applied to events occurring

before its enactment, and (2) its application disadvantages the offender affected by it." *United States v. Lopez-Solis*, 447 F.3d 1201, 1205 (9th Cir. 2006) (internal quotations omitted). The clause "forbids punishing individuals for acts that were legal at the time they were *completed*." *United States v. Jackson*, 480 F.3d 1014, 1020 (9th Cir. 2007) (emphasis in original). In the context of conspiracy law, the *ex post facto* clause demands that a jury not convict a defendant solely on the basis of conduct predating enactment of the statute criminalizing the conduct at issue. *See United States v. Campanale*, 518 F.2d 352, 365 (9th Cir. 1975) (permitting conviction of defendants for conspiracy straddling date of enactment of law criminalizing conduct where defendants "were not convicted of conspiracy under 18 U.S.C. § 1962(d) for acts committed prior to October 15, 1970; rather they were convicted for having performed post-October 15, 1970, acts in furtherance of their continued racketeering conspiracy after being put on notice that these subsequent acts would combine with prior racketeering acts to produce the racketeering pattern against which this section is directed"); *United States v. Monaco*, 194 F.3d 381, 386 (2d Cir. 1999) ("A conviction for a continuing offense straddling enactment of a statute will not run afoul of the Ex Post Facto clause unless it was possible for the jury, following the court's instructions, to convict '*exclusively*' on pre-enactment conduct.")

(quoting *United States v. Harris*, 79 F.3d 223, 229 (2d Cir. 1996) (emphasis in original)).

Thus, in *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), for example, the Fifth Circuit reversed a defendant's conviction for conspiracy under 18 U.S.C. § 1962(d) where the district court failed to caution the jury "that a verdict of guilty could not be returned unless the Government demonstrated the existence of a conspiracy *of which the accused was a member*" after the date of the statute's enactment. *Id.* at 419 (emphasis added). The Court noted that the failure of the district judge to give the appropriate instruction "thus allow[ed] appellants to be convicted for acts done before the passing of the law, and which were innocent when done," which was "in violation of the ex post facto principle embodied in the due process clause." *Id.* at 420 (internal quotations omitted). *See also United States v. Allemand*, 34 F.3d 923, 926 (10th Cir. 1994) (noting that conspirators "could not have specifically intended to violate a law when it did not exist"); *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) ("'Pure legal impossibility is always a defense. For example, a hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place.'…Obviously, a charge of conspiracy to shoot

a deer would be equally untenable.") (quoting *United States v. Hsu*, 155 F.3d 189, 199 n.16 (3rd Cir. 1998)).

Critical to avoiding the *ex post facto* problem is a showing by the Government that the defendant affirmatively participated in the conspiracy after enactment of the statute criminalizing the conduct at issue. *See Christianson v. United States*, 226 F.2d 646, 652 (8th Cir. 1955) (stating that jury was correctly instructed that "there could be no conviction for an unlawful conspiracy to violate the Johnson Act" unless the agreement that was entered into prior to enactment of the Johnson Act "was recognized and adhered to to an extent that amounted to its reaffirmance after the Johnson Act became effective"); *Allemand*, 34 F.3d at 927 (jury could only convict "on the basis of evidence that followed the amendment's effective date, and thus would support a finding of specific intent"). The Government cannot make that showing merely by demonstrating "simple knowledge, approval of, or acquiescence in the object or purpose of a conspiracy, without an intention and agreement to accomplish a specific illegal objective." *United States v. Lennick*, 18 F.3d 814, 818 (9th Cir. 1994) (internal quotation omitted). Rather, all elements of the offense, "(1) an agreement to accomplish an illegal objective; (2) the commission of an overt act in furtherance of the conspiracy; and (3) the requisite intent necessary to

commit the underlying offense," must be present after enactment of the statute criminalizing the defendant's conduct. *Id.* (internal quotation omitted). To avoid running afoul of the *ex post facto* clause, the Government must prove that each conspirator specifically agreed to violate a given statute *after* its enactment.

This Court also has endorsed the logic underlying this position. For example, in its June 8, 2006 Order, this Court indicated that overt acts occurring prior to November 15, 1990 could not have been undertaken in furtherance of the knowing endangerment object of Count I, stating:

> The government continues to argue that each overt act alleged in the Indictment is alleged to have been done in furtherance of both objects of the conspiracy. As they say, 'that dog don't hunt.' The argument does not work for several reasons, the most obvious of which is that the criminal Clean Air Act provision upon which the knowing endangerment charge is based was not enacted until 1990, long after dozens of the alleged overt acts in furtherance of the conspiracy had already occurred. *United States v. W.R. Grace*, 434 F.Supp.2d 879, 885 n.7 (D. Mont. 2006).

Given all of the above, it stands to reason that the Non-CAA Defendants cannot have agreed prior to November 15, 1990 to violate 42 U.S.C. § 7413(c)(5)(A). Accordingly, the *ex post facto* clause prohibits a conviction on that basis.

B. The Government has conceded in its opening statement that there is no evidence that the Non-CAA Defendants agreed to violate 42 U.S.C. § 7413(c)(5)(A) after November 15, 1990.

The Government in its opening statement identified not one piece of expected evidence showing that the Non-CAA Defendants joined a conspiracy to violate 42 U.S.C. § 7413(C)(5)(A) on, or after, November 15, 1990. Perhaps anticipating that their failure of proof would present an *ex post facto* problem, the Government took the opportunity during the February 20, 2009 hearing in this case to direct the Court's attention to three cases: *United States v. Kubick*, 205 F.3d 1117 (9th Cir. 1999); *United States v. Hersh*, 297 F.3d 1233 (11th Cir. 2002); and *Leyvas v. United States*, 371 F.2d 714 (9th Cir. 1967). None of these cases, however, solves the Government's problem; rather, all three stand for the unremarkable proposition – which we acknowledge above – that a defendant can be convicted of a conspiracy to violate a statute if there is evidence of both pre-*and post*-enactment conduct on the part of that defendant. None of the cases cited by the Government supports the proposition that a conviction can be based solely on pre-enactment conduct, contrary to the Government's prosecution of the Non-CAA Defendants for conspiracy to violate 42 U.S.C. § 7413(C)(5)(A).

In *United States v. Kubick*, 205 F.3d 1117 (9th Cir. 1999), the Ninth Circuit reversed the district court's finding that application of the Mandatory Victim Restitution Act of 1996 (MVRA), 18 U.S.C. § 3663A, would constitute an *ex post facto* violation because no overt acts in furtherance of the conspiracy took place after the effective date of the MVRA. However, the Ninth Circuit explicitly based its reversal on the fact that the defendants' plea agreements "expressly acknowledge" that they participated in a conspiracy until a date more than three months after the date the MVRA went into effect. *Id.* at 1128-130. In contrast, the Non-CAA Defendants have not admitted that they participated in any conspiracy, much less one that continued past November 15, 1990.

In *United States v. Hersh*, 297 F.3d 1233 (11th Cir. 2002), the Eleventh Circuit concluded that the defendant's conviction for conspiracy to travel in foreign commerce with intent to engage in sexual acts with minors did not run afoul of the *ex post facto* clause where the law the defendant was accused of conspiring to violate became effective shortly before the last overt act alleged in the indictment. However, the *Hersh* Court based its conclusion on the fact that the "government proved that Hersh had formed the necessary intent to sustain the conspiracy count" when he again engaged in acts in furtherance of the conspiracy after the effective date of the statute.

Id. at 1247. Here, in contrast, the Government has failed to identify any evidence of an act in furtherance of a conspiracy to violate 42 U.S.C. § 7413(C)(5)(A) by any of the Non-CAA Defendants on or after November 15, 1990.

In *Leyvas v. United States*, 371 F.2d 714 (9th Cir. 1967), the Ninth Circuit reversed the district court's decision to reduce the defendant's sentence on a conspiracy count. The Ninth Circuit concluded that the defendant could be sentenced under a stricter statute that went into effect after the date of the last overt act alleged in the indictment. *Id.* at 717-18. However, the Ninth Circuit did so only after noting that the defendant "did not contend on his original appeal, and except for his point as to the necessity of showing an overt act, does not now contend, that there is no substantial evidence to support the implicit jury finding that the conspiracy continued until November 21, 1956," past the date of enactment of the law imposing a stricter sentencing regime. *Id.* at 717-18. In marked contrast to the defendant in *Leyvas*, the Non-CAA Defendants contend that the Government has pointed to no evidence to support a finding that they participated in a conspiracy to violate 42 U.S.C. § 7413(c)(5)(A) on or after November 15, 1990.

The Government cites the above three cases to support the unexceptionable proposition that "[t]he *ex post facto* clause is not violated . . . when a defendant is charged with a conspiracy that continues after the effective date of the statute." *Hersh*, 297 F.3d at 1244. However, the Government's cases do not address the situation at issue in this Motion, in which the Non-CAA Defendants face conviction for conspiracy to violate 42 U.S.C. § 7413(C)(5)(a) solely on the basis of actions taken prior to the enactment of that statute. Accordingly, the Government's cases have no application to the circumstances here.

III. THE PROPER REMEDY IS ENTRY OF A JUDGMENT OF ACQUITTAL ON THE KNOWING ENDANGERMENT OBJECT OF COUNT I AS TO THE NON-CAA DEFENDANTS

A. Entry of a judgment of acquittal on the knowing endangerment object of Count I is appropriate, given the Government's inability to articulate involvement of the Non-CAA Defendants in a conspiracy to violate 42 U.S.C. § 7413(c)(5)(A) on or after November 15, 1990.

In the Ninth Circuit, entry of a judgment of acquittal is appropriate when, viewing the evidence in the light most favorable to the Government, no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Chapman*, 528 F.3d 1215, 1218 (9th Cir. 2008) (internal quotation omitted) (reversing denial of entry of judgment of acquittal on charge of forcibly resisting, opposing, impeding,

and interfering with federal officer where evidence existed solely of nonviolent civil disobedience); *see also United States v. Correll-Gastelum*, 240 F.3d 1181, 1183 (9th Cir. 2001) (reversing denial of entry of judgment of acquittal on charge of conspiracy to possess marijuana with intent to distribute where evidence existed solely of defendant's mere proximity to marijuana). Here, the Government has conceded by its opening statement that it will not prove that the Non-CAA Defendants agreed to violate 42 U.S.C. § 7413(c)(5)(A) on, or subsequent to, its enactment on November 15, 1990. Other courts, confronted with similar *ex post facto* issues, have deemed entry of a judgment of acquittal an appropriate remedy. *See United States v. Gillette*, 553 F. Supp. 2d 524, 533 (D.V.I. 2008) (granting motion for judgment of acquittal on charge that defendant failed to register under sex offender statute, where defendant's failure occurred prior to statute's enactment); *United States v. Bateman*, 805 F. Supp. 1053, 1056 (D.N.H. 1992) (stating in dicta that if evidence were to show defendant did not possess child pornography after enactment of statute criminalizing such possession, defendant may be entitled to judgment of acquittal).

Moreover, a court can enter a judgment of acquittal on one object of a multi-object conspiracy. In *United States v. Garcia*, 27 F.3d 1009 (5th Cir. 1994), the Fifth Circuit reviewed on appeal the district court's grant of

acquittal on one of two objects charged in a single conspiracy. According to the *Garcia* court, "[t]he district court's grant of acquittal on one of the alleged underlying substantive offense objectives of the conspiracy did not preclude the jury from convicting the appellants for conspiring to commit the other alleged object offense." *Id.* at 1016. Indeed, this Court itself previously dismissed the knowing endangerment object of Count I in the original indictment on statute of limitations grounds. *United States v. W.R. Grace*, 434 F. Supp. 2d 879 (D. Mont. 2006).[1] The remedy of judgment of acquittal on a single object of a multi-object conspiracy is especially appropriate where, as here, that object is constitutionally infirm as to the Non-CAA Defendants. *See Griffin v. United States*, 502 U.S. 46, 53 (1991) ("[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee [of due process] is violated by a general verdict that may have rested on that ground.") (citing *Stromberg v. California*, 283 U.S. 359 (1931)). Accordingly, there is no impediment to this Court granting a judgment of acquittal on the same knowing

[1] Nothing in the Ninth Circuit's reversal of this Court's subsequent decision dismissing the knowing endangerment object of the Superseding Indictment, 455 F. Supp. 2d 1113 (D. Mont. 2006), casts doubt on the Court's implicit ruling that it is permissible to dismiss one object of a multi-object conspiracy. *See United States v. W.R. Grace*, 504 F.3d 745 (9th Cir. 2007).

endangerment object of Count I of the superseding indictment on *ex post facto* grounds.

B. Entry of a judgment of acquittal is proper following an opening statement in which the Government concedes it cannot prove the offense charged.

A judgment of acquittal may be entered not only at the close of the government's case, but also at the conclusion of the Government's opening statement.[2] *See Rose v. United States*, 149 F.2d 755, 758 (9th Cir. 1945)

[2] In *United States v. Buckley*, 689 F.2d 893, 900 n.6 (9th Cir. 1982), the Ninth Circuit explicitly declined to address whether the propriety of a grant of a judgment of acquittal following the Government's opening statement survives dicta in the Supreme Court's opinion in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 n.8 (1977). In *Martin Linen*, the Supreme Court cited Federal Rule of Criminal Procedure 29 for the proposition that "[a] motion under Rule 29 for a judgment of acquittal can be entertained, at the earliest, after the evidence on either side is closed." *Id.* (internal quotation omitted). However, there are strong indications that Federal Rule of Criminal Procedure 29 was not intended to preclude the availability of alternate common law remedies for defendants. *See United States v. Capocci*, 433 F.2d 155, 158 (1st Cir. 1970) ("But Fed.R.Crim.P. 29(a) was not meant to change the common law.") (citation omitted). *See also Mandamus to Review Judgments of Acquittal in Federal Courts*, 71 Yale L.J. 171, 173 (1961) ("It is doubtful, moreover, that Rule 29a should be construed so as to place any limitations upon the trial court's power to enter a judgment of acquittal. The rule contains no positive prohibition to that effect. Nor did it change the common law, which by making no allowance for appellate review of acquittals, placed no enforceable limitations upon the judge's power to enter a judgment of acquittal."). Moreover, other courts in the wake of *Martin Linen* continue to assume the availability of a judgment of acquittal following the Government's opening statement. *See, e.g., United States v. Donsky*, 825 F.2d 746, 751-52 (3rd Cir. 1987) (reaffirming rule that "a dismissal or a directed verdict may be ordered at the conclusion of the prosecution's opening statement only when the prosecution has made

(holding in criminal case that a judgment of acquittal may be entered after the Government's opening statement "only when the statement affirmatively shows that plaintiff has no right to recover, and only when the opportunity to correct or embellish it has been given plaintiff subsequent to defendant's motion to dismiss or to direct a verdict") In the case *United States v. Dietrich*, 126 F. 676 (C.C. Neb. 1904), Justice (then Judge) Van Devanter stated:

> Where, by the opening statement for the prosecution in a criminal trial, and after full opportunity for the correction of any ambiguity, error, or omission in the statement, a fact is clearly and deliberately admitted which must necessarily prevent a conviction and require an acquittal, the court may, upon its motion or that of counsel, close the case by directing a verdict for the accused. The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end. *Id.* at 677-78.

In *Dietrich*, the defendant was charged with violating a statute that made it a crime for a member of Congress to take or agree to take a bribe.

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a clear and deliberate concession which must necessarily prevent a conviction, and then only after the prosecution has been given a full opportunity to correct any errors or omissions in its opening statement"); *United States v. Ingraldi*, 793 F.2d 408, 413 (1st Cir. 1986) (noting that although wording of Rule 29(a) "indicates that a motion for judgment of acquittal may only be brought after the close of either side's evidence," the First Circuit "has held that the motion can be brought after the government's opening statement in certain limited circumstances").

Id. at 677. During its opening statement, the Government conceded that the defendant had not yet taken office at the time he accepted the bribe at issue. *Id.* The defendant then moved the Court to direct a verdict of not guilty because the defendant was not a member of Congress at the time the Government alleged the offense was committed. *Id.* The Court directed the not guilty verdict, both "[b]ecause membership in Congress is indispensible under the statute, to the commission of the offense here charged" and "because, upon the facts admitted by counsel for the government, it is clear to us that the defendant was not a member of Congress at the time when it is proposed to be proved that he committed the acts described in the indictment." *Id.* at 685-86.

As noted above, two elements of the offense of conspiracy are that the defendant agree "to accomplish an illegal objective" and that the defendant possess "the requisite intent necessary to commit the underlying offense." *Lennick*, 18 F.3d at 818. Also discussed above is the principle that the *ex post facto* clause requires that, for each defendant, the Government must prove that he or she satisfies each of those two elements through conduct undertaken on or after the enactment of 42 U.S.C. § 7413(C)(5)(A). In its opening statement, the Government failed to identify any evidence indicating that the Non-CAA Defendants agreed or intended on or after

November 15, 1990 to violate 42 U.S.C. § 7413(C)(5)(A). This failure by the Government constitutes a concession that its proof will fail as to the Non-CAA Defendants on those two elements of conspiracy. As with the Government's failure in *Dietrich* to articulate that the defendant accepted any bribe after he became a member of Congress, the Government's failure in this case to identify any evidence that the Non-CAA Defendants agreed on or after November 15, 1990 to violate 42 U.S.C. § 7413(C)(5)(A) "must necessarily prevent a conviction and require an acquittal" of the knowing endangerment object of Count I. *Dietrich*, 126 F. at 677. Accordingly, entry of a judgment of acquittal on the knowing endangerment object of Count I is the appropriate remedy.

IV. CONCLUSION

The Government's opening makes clear that the *ex post facto* clause will bar further prosecution of the Non-CAA Defendants for conspiracy to violate 42 U.S.C. § 7413(c)(5)(A). Accordingly, for all the reasons set forth above, this Court should enter an order at this time granting a judgment of acquittal of the Non-CAA Defendants with respect to the knowing endangerment object of Count I.

RESPECTFULLY SUBMITTED this 23rd day of February, 2009.

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